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VIA ELECTRONIC FILING

David Stark, Esquire
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Request for Response for Proposed Procedural Schedule for Fuel Cases
Docket No. 2005-83-A

Dear Mr. Stark:

I am filing this letter on behalf of Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (together, the "Companies") in response to your message dated September 8, 2020 seeking comments on a proposed schedule for the administration of fuel hearings for the Companies for 2021 and 2022 ("Proposed Schedule"). The Companies can commit to providing proposed orders on a set date as contemplated by the proposed schedule.[1] However, aside from that issue, the Companies cannot agree to the changes in the schedule that effectively eliminate any meaningful time between the filing of surrebuttal testimony and the start of the evidentiary hearing. The Companies believe that the extremely short amount of time in the Proposed Schedule between the filing of other parties' surrebuttal testimony and the hearing would compromise the procedural fairness of these proceedings and the Companies' due process rights, and be inconsistent with the Commission's regulations and South Carolina law.

Procedural fairness requires sufficient time between the filing of intervenors' surrebuttal testimony and the hearing, and the Proposed Schedule would significantly compromise such fairness. The Proposed Schedule contemplates either zero (0) business days or one (1) business day between the filing and service of other parties' surrebuttal testimony and the hearing. At the same time, other parties would have more than a week to review and evaluate the Companies' rebuttal testimony ahead of the hearing, and more than six weeks to review and evaluate the Companies' direct testimony.

[1] These dates could be compromised if a hearing runs longer than anticipated, or if issues arise with late filed exhibits or transcript availability, but the Companies believe such issues could be worked through as they arise.

Pre-filing testimony the business day before the hearing is not compliant with the requirements of S.C. Code Ann. § 58-3-140(D) that testimony be pre-filed, and is inconsistent with the purpose of pre-filing testimony. As the Commission has previously found, the purpose of pre-filing testimony is to provide for notice of the issues, accord fairness to all parties, and allow for a more orderly and efficient hearing. Order No. 1996-259-WS at 2, Docket No. 1996-629 (Sept. 10, 1996); *see also* S.C. Code Ann. Regs. 103-802 ("[The Commission's regulations concerning Practice and Procedure] are intended to insure that all parties participating in proceedings before the Commission will be accorded the procedural fairness to which they are entitled by law."). Permitting surrebuttal testimony to be filed a few days before the hearing would not serve these goals, and would compromise the procedural fairness of the proceeding in contravention of S.C. Code Ann. Regs. 103-802 and South Carolina caselaw. *See, e.g.*, *Ross v. Med. Univ. of South Carolina*, 317 S.C. 377, 381, 453 S.E.2d 880, 883 (1994) ("[A] reviewing court has the duty to examine the procedural methods employed at an administrative hearing to ensure that a fair and impartial procedure was used.").

Utilities have a right to understand not only the substance of surrebuttal testimony, but also the underlying basis for the positions articulated therein. This principle underlies the request of the environmental intervenors in the Companies' fuel cases, as they have requested additional time to conduct discovery. While the Proposed Schedule appears to be responsive to the environmental intervenors' request, the Proposed Schedule would significantly restrict the Companies' ability to review and understand surrebuttal testimony itself, much less permit them to obtain discovery regarding its underlying support. The Proposed Schedule also allows for no time in which the Companies could file motions upon the surrebuttal testimony or motions to compel on discovery on the surrebuttal testimony, both of which would need to be filed well before the start of the evidentiary hearing. For example, S.C. Code Ann. Regs. 103-829 contemplates a 10-day window for such motions. Further shrinking the time—which is already tight—between surrebuttal testimony and the start of hearing would be fundamentally unfair. Due process "calls for such procedural protections as the situation demands." *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016). Further, due process requires that the entity in jeopardy of loss—in this case, a utility and its recovery of fuel costs—be given adequate "notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). The Companies believe that seven days is the minimum amount of time needed between surrebuttal testimony and the start of an evidentiary hearing. A utility receiving another party's case against it in a fuel proceeding only one or two business days prior to the hearing would compromise these fundamental constitutional requirements and violate the Commission's own rules.

Other parties in the fuel proceedings have multiple, ample opportunities to learn about the Companies' fuel case. For more than a decade, the Companies have filed—and continue to file—monthly reports in Docket Nos. 1989-9-E and 2006-176-E that detail their monthly fuel costs and power plant performance information, the two pillars of a utility's fuel case. These reports are publicly available and provide dozens of pages of data and information that provide a preview of the fuel case. Often, another party will propound discovery late in a fuel proceeding and then claim that it has had insufficient time. As well-articulated in Dominion's comments filed in this proceeding on August 19, 2020, "[t]hat some intervenors may wait until the last minute to send discovery and then complain about not having enough time to prepare their case is an emergency of their own making."

The Companies reassert that no change to the procedural schedules applicable in their respective fuel cases is warranted or appropriate. Other parties would do well to better utilize the information and time already available to them. As explained above, the timeline contemplated in the Proposed Schedule would compromise the procedural fairness of these proceedings, deprive the Companies of their due process rights, and be inconsistent with the Commission's regulations and South Carolina law. For these reasons, the Companies request that the Commission find that no change is warranted at this time.

Kind regards,

Sam Wellborn

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cc: Parties of Record (via email)
Heather Shirley Smith, Deputy General Counsel (via email)
Rebecca J. Dulin, Associate General Counsel (via email)
Katie M. Brown, Counsel (via email)